

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

IBLA 92-594

Decided January 22, 1998

Appeal from a decision of the Acting State Director, Eastern States, Bureau of Land Management, dismissing a protest of a dependent resurvey. Group 28, Missouri.

Appeal dismissed.

1. Administrative Procedure: Standing—Rules of Practice: Appeals: Standing to Appeal—
-Surveys of Public Lands: Dependent Resurveys

An appeal by a state from a BLM decision dismissing a protest of a dependent resurvey of a section corner marking the boundary between public and private lands is dismissed for lack of standing to appeal when the state fails to show the resurvey adversely affects the state's obligation under state law to maintain the original public land survey corner and any restoration thereof.

APPEARANCES: Robert E. Myers, State Land Surveyor, Division of Geology and Land Survey, Department of Natural Resources, State of Missouri, Rolla, Missouri, William J. Bryan, Esq., Assistant Attorney General, State of Missouri, Jefferson City, Missouri, for the State of Missouri, Department of Natural Resources; Lori R. F. Monroe, Esq., Office of the Solicitor, Division of Land and Water Resources, Department of the Interior, Washington, DC, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Missouri, through its Department of Natural Resources (State), has appealed from a July 21, 1992, Decision of the Acting State Director, Eastern States, Bureau of Land Management (BLM), dismissing a protest of the dependent resurvey of the corner common to secs. 5, 6, 7, and 8 (NE corner of sec. 7), T. 28 N., R. 6 E., Fifth Principal Meridian, Wayne County, Missouri. That corner controls the boundary between land within the Mark Twain National Forest in sec. 6 (SE $\frac{1}{4}$ SE $\frac{1}{4}$) and private land

in the adjacent sections. The State contends that the corner remonumented by BLM during the resurvey is not the corner established in the original 1821 survey.

The NE corner of sec. 7 was originally surveyed by J.W. Barton, a surveyor with the General Land Office (GLO) (BLM's predecessor), in 1821 during the course of a survey of the subdivisional lines of T. 28 N., R. 6 E., Fifth Principal Meridian, Wayne County, Missouri. The corner was monumented with a wood post that was tied to two trees, a 20-inch diameter black oak 27 links from the monument on a bearing of N. 28° E. and an 18-inch diameter white oak 50 links from the monument on a bearing of S. 30° W. The quarter corner between secs. 5 and 6 was located 40 chains north of the NE corner of sec. 7 and was monumented with a wood post also tied to two trees, a 15-inch diameter pine 17 links from the monument on a bearing of N. 55° E. and a 12-inch diameter white oak at an unspecified distance on a bearing of S. 38° W. Topographic calls were made to a 13-link-wide "run" bearing southwest 55 chains north from the NE corner of sec. 7 and to a 12-link-wide "brook," also bearing southwest, 42.5 chains west from that corner. The corner was 80.68 chains west of the corner common to secs. 4, 5, 8, and 9 in the same township.

The NE corner of sec. 7 was resurveyed during a dependent resurvey (Group No. 28, Missouri) of the Wappapello Lake Boundary in secs. 7 and 18, T. 28 N., R. 6 E., Fifth Principal Meridian, Wayne County, Missouri, requested by the U.S. Army Corps of Engineers (Army) in order to provide a control point for reestablishing the boundaries of Wappapello Lake. Field work for the resurvey was performed by William H. Herbst, a BLM surveyor, between November 1989 and March 1990. He did not find a wood post at what he believed to be the NE corner of sec. 7, but recovered a flintstone that measured 13 by 12 by 11 inches and appeared to have been originally set almost vertically in the ground for about two-thirds of its length. He concluded that this was a perpetuation of the corner. The original bearing trees were not found. Instead, Herbst identified a depression, believed to be the site of the black oak, 23.5 links from the position of the stone on a bearing of N. 22° E. (rather than 27 links therefrom, on a bearing of N. 28° E.). He also identified a stump hole filled with rotted wood, believed to be the remains of the white oak, 48.5 links from the stone on a bearing of S. 30° W. (rather than 50 links on a bearing of S. 30° W.). Herbst remonumented the NE corner of sec. 7.

At a point 40 chains north of the NE corner of sec. 7, Herbst did not find the wood post marking the quarter corner between secs. 5 and 6. Instead, at 40.01 chains on a bearing of N. 1° 59.6' E. from the section corner, he found two pine knots and a stone collar, believed to be a perpetuation of the quarter corner. At a record bearing and distance from that position, he found a depression presumed to be the remains of an original bearing tree. Continuing on a bearing of N. 1° 59.6' E. from the quarter corner, he discovered that the line was crossed by a 5-link-wide seasonal creek bearing S. 75° W., at the distance of 54.45 (rather than 55) chains from the NE corner of sec. 7. He also discovered a 5-foot high,

12-inch diameter oak snag with two hack marks 2.83 chains from the section corner on a bearing of N. 89° 57.2' W. Continuing on a bearing of N. 85° 22.7' W. from that corner, he crossed a 15-link-wide creek bearing S. 20° W., at a point 41.90 (rather than 42.5) chains from the section corner. The corner was found to be 76.7 (rather than 80.68) chains on a bearing of N. 88° 54.3' W. from the NE corner of sec. 8.

Immediately upon the conclusion of Herbst's field work, the Forest Service, U.S. Department of Agriculture (Forest Service), questioned his location of the NE corner of sec. 7. The Forest Service complained that Herbst's preliminary placement of the corner "significantly relocates all of the historic property lines in the area and affects the * * * [b]oundary [of the Mark Twain National Forest]." (Letter to Congressman Emerson from Forest Supervisor, Mark Twain National Forest, Forest Service, dated Mar. 28, 1990.) The Forest Service believed the corner was "lost." Id.

Kenny D. Ravnika, a BLM field examiner, thereupon undertook to verify the work performed by Herbst. Following in the footsteps of Herbst, he likewise concluded that the flintstone recovered by Herbst was a perpetuation of the original NE corner of sec. 7. He found that "[a]lthough there is no available record of the individual(s) responsible for this perpetuation, the use of set stones or pine knots to perpetuate identified original corner positions was a common practice of the local surveyors in this area." (Memorandum to the Deputy State Director for Cadastral Survey, dated June 18, 1990, at 5.) Ravnika also stated that, while the original field notes did not call for line trees, the oak snag west of the NE corner of sec. 7 monumented by Herbst "appeared quite ancient, and the marks were characteristic of those made while marking line trees." Id. at 2. He also noted a "reasonably good" correlation between Herbst's and Barton's work regarding the position of the flintstone and the corners common to secs. 7, 8, 17, and 18 and secs. 17, 18, 19, 20 immediately to the south in the same township. Id. at 4.

A copy of Ravnika's report was sent to the Forest Service and the State land surveyor. In an August 7, 1990, letter, the State land surveyor, noting that he had been having discussions with concerned landowners, informed BLM that he would review the report and notify BLM of his findings. In a January 22, 1991, letter to the Forest Service (copied to BLM), the State land surveyor concluded that the NE corner of sec. 7 monumented by Herbst was not the original corner. He based his conclusion on the fact the original surveyor had not set a stone at the corner and a lack of evidence that a stone was ever set to mark the corner. He noted that the corner was traversed by county surveyor H.C. Wilkinson, who found no post or other monument at that location in July 1906. The State land surveyor argued that 26 stones similar to that recovered by Herbst were to be found within an 80-foot radius of the NE corner of sec. 7, that bearings and distances to the bearing trees did not match the original record, and the distance to the brook did not match the original record. He also disputed Herbst's location of the quarter corner between secs. 5 and 6 and how it was tied to the NE corner of sec. 7. Finally, he stated that

Herbst's placement of the corner "does not coincide with current occupation in sec[s.] 6 [and] 7 which can be shown to have existed prior to 1912." (Letter to Forest Service, dated Jan. 22, 1991, at 5.) In the end, the State land surveyor concluded that the NE corner of sec. 7 should be considered "obliterated" since it could be located by relying on collateral evidence, particularly the work of county and private surveyors in the area since 1892. Id. at 6. The Forest Service agreed with this analysis, while characterizing the BLM survey as a whole to be "exemplary." See letter to Army, dated Mar. 6, 1991, at 1, 2.

In a June 24, 1991, letter, BLM agreed there was no evidence to show when a stone was used to perpetuate Barton's location of the NE corner of sec. 7, but noted that county records had been destroyed by two fires in 1854 and 1892 and that any record of a county surveyor setting a stone would then have been lost. The BLM also pointed out that there were numerous surviving reports of instances where county surveyors (including Wilkinson) did use stones to perpetuate original GLO corners. The BLM stated that it had searched the area surrounding the NE corner of sec. 7 during the course of the survey field work and the April 1990 field examination and that, while numerous stones were to be found, "none displayed the characteristics generally associated with stones physically set to monument corner positions." (Letter to State land surveyor, dated June 24, 1991, at 2-3.) By contrast, BLM noted that Herbst had concluded that the stone relied upon by him "was not naturally occurring, but had been deliberately set." Id. at 3. The BLM also continued to find support in Herbst's evidence regarding the two bearing trees for that corner, noting that there was only a slight discrepancy in bearings and distances between what was reported by him and what Barton had recorded, and that this discrepancy was attributable to the fact that Barton had used a magnetic compass and chain. Further, BLM was not persuaded by evidence of longstanding occupation, since there was nothing to show that it was representative of the lines of the original survey. The BLM concluded that substantial evidence supported the conclusion that the stone recovered by Herbst was a true perpetuation of the original monument set by Barton.

In January 1992, State surveyor Norman L. Brown remonumented what he regarded as the NE corner of sec. 7. He noted that in June 1912, Wilkinson recovered monuments set in August 1892 by county surveyor J. Yancey for the east sixteenth and quarter corners on the line between secs. 6 and 7. He observed that, adhering to Wilkinson's survey, private surveyor D.R. Barfield remonumented these corners in April 1986 and then continued west on the line between secs. 6 and 7 to the range line, remonumenting Yancey's location of the west sixteenth corner. Relying on this work, Brown located the NE corner of sec. 7 by running a line east from the east sixteenth corner (set by Yancey, recovered by Wilkinson, and remonumented by Barfield) on the line between secs. 6 and 7. The distance run was the same distance as that between the east sixteenth corner and the quarter corner (also set by Yancey, recovered by Wilkinson, and remonumented by Barfield) to the west since it was felt that Yancey had followed

acceptable surveying practices. Certification of Brown's restoration of the NE corner of sec. 7 was signed by him on February 25, 1992, and filed for record with the State on July 15, 1992.

The work of Yancey and Wilkinson was considered by BLM. Nonetheless, BLM discounted Yancey's placement of the quarter corner on the line between secs. 6 and 7, since it was situated 3.5 chains west of the brook, rather than 2.5 chains east of the brook (as recorded by Barton). Moreover, BLM noted that the quarter corner was never tied to the NE corner of sec. 7. The BLM found that this was also true of the east and west sixteenth corners set by Yancey since they had simply been set a record distance from the quarter corner and the section corner on the range line. Since none of these corners had ever been tied to the NE corner of sec. 7, BLM concluded that they could not serve as evidence of its location.

The BLM's final resurvey plat and field notes were accepted February 3, 1992, by the chief cadastral surveyor, Eastern States, BLM. Notice thereof was published in the Federal Register. See 57 Fed. Reg. 5167 (Feb. 12, 1992). On March 24, 1992, the State protested acceptance of the plat and field notes, again contending that the NE corner of sec. 7 remonumented by BLM was not the original corner established by Barton in 1821. The State reiterated there was no evidence the stone recovered by Herbst was placed at the location of the original corner. The State described discrepancies in bearing and distance to the northeast bearing tree for that corner (6 degrees and 3.5 links) as significant and uncommon in Missouri surveys. In the case of the southwest bearing tree, the State reported that an analysis of the remains of the tree, recorded by Barton as a white oak, were those of a hickory. See memorandum to State land surveyor, dated May 11, 1992, at 2. Further reference was made by the State to discrepancies between Herbst and Barton in distances to the run and the brook, north and west of the NE corner of sec. 7.

In his July 1992 Decision, the Acting State Director found that BLM had carefully weighed the State's allegations concerning discrepancies in bearings and distances. See Decision at 3. He concluded that, while such discrepancies may not have been common in Missouri surveys, they were not uncommon in surveys performed by Barton. The Acting State Director referred, by way of illustration, to an 1855 resurvey by Aaron Snider, a GLO surveyor, of lines originally surveyed by Barton in T. 29 N., R. 4 E., Fifth Principal Meridian, Missouri. Id. According to the Acting State Director, Snider reported discrepancies in Barton's reported bearings and distances to bearing trees, "ranging from gross variations to those of relatively the same magnitude as reported in the 1989 dependent resurvey." Id. at 3-4. The Acting State Director also noted that the 1855 resurvey disclosed that Barton had incorrectly described the species of a bearing tree by identifying a hickory as an oak in some cases. Accordingly, the Acting State Director dismissed the State's protest, concluding that the State had not established by a preponderance of the evidence that BLM's resurvey had incorrectly located the NE corner of sec. 7. The State has appealed from the Acting State Director's July 1992 Decision.

In a statement of reasons for appeal (SOR), the State contends that BLM has failed to show by substantial evidence that the NE corner of sec. 7 as remonumented is the original corner established by Barton in 1821. Reference is made again to a lack of evidence that the corner was perpetuated by a stone, and it is alleged that current evidence regarding the location of the bearing trees and the topographic calls do not match the original record. The State also argues that BLM's location of the corner places the section line 460 feet from local lines of occupation.

There is, however, a question whether the State has standing to appeal from the Acting State Director's July 1992 Decision. In the absence of standing to appeal, the Board is without jurisdiction to consider the appeal, and it must be dismissed. State of Alaska (Anna Nick), 121 IBLA 155, 160 (1991). In order to have standing to appeal, the State must be a "party to [the] case" and have a legally recognized interest which will be "adversely affected" by the July 1992 Decision. 43 C.F.R. § 4.410(a); Missouri Coalition for the Environment, 124 IBLA 211, 216 (1992). We have no problem finding that the State is a party to the case, by virtue of the filing of its protest. See Burton A. McGregor, 119 IBLA 95, 98-99 (1991). However, dismissal of the State's protest does not render the State adversely affected by the July 1992 Decision. See Colorado Open Space Council, 109 IBLA 274, 280 (1989). The parties have briefed the question of standing, in response to a request by this Board. The State now argues, as has been the case throughout these proceedings, that its "parens patriae obligations to its people" confers standing in this case. See State's brief on standing (Brief) at 2. This argument is buttressed by reference to a state statute requiring the State to "restore, maintain, and preserve" original public land survey corners, and by reference to a memorandum of understanding with BLM entered into for the purpose of fostering effective cooperation between the State and BLM. (Brief at 2, 3, 6.)

It is asserted that the State is acting pursuant to statutory authority under Mo. Ann. Stat. § 60.550 (Vernon 1989), which creates a responsibility to preserve and maintain survey corners of the United States and their accessories. See Protest, dated May 18, 1992, at 1; SOR at 2; Brief at 5, 6. The cited provision transfers custody and ownership of "original United States public land survey corners and accessories, including all restoration and replacements thereof and all accessories, belonging to the state of Missouri" to the Department of Natural Resources and requires their maintenance. Mo. Ann. Stat. § 60.550 (Vernon 1989). Nonetheless, there is nothing in the statute to indicate that, in dismissing the State's protest and thereby affirming BLM's location of the NE corner of sec. 7, the Acting State Director will adversely affect the State's interest in maintaining a U.S. survey corner and its accessories. The State's authority clearly extends only to the maintenance of U.S. survey corners and their accessories that "belong[] to the state of Missouri." Id. Even assuming the original corner monument were to exist, it would not belong to the State; it is clearly the property of the United States since it marks the boundary of public lands. The State, likewise, has no property interest in BLM's resurvey monument.

[1] Nevertheless, the State, through the Department of Natural Resources, has responsibility to "restore" land survey monuments and section corners "established by the United States public land survey within Missouri." Mo. Ann. Stat. § 60.510 (Vernon 1989). That responsibility has not been violated by BLM's resurvey of the NE corner of sec. 7. The State has cited no authority, co-extensive in whole or in part with that of BLM under Federal law, see Wilogene Simpson, 110 IBLA 271, 275 (1989), to resurvey a corner marking the boundary between public and private lands. The State has no responsibility for reestablishing such a corner in its original position. At most, only the State's interest in seeing that BLM performs duties required by Federal law governing resurveys is at stake here. Such an interest is not sufficient to afford standing to appeal. See State of Nevada v. Burford, 918 F.2d 854, 856-57 (9th Cir. 1990), cert. denied, 111 S. Ct. 2052 (1991); Sharon Long, 83 IBLA 304, 308, 309 (1984).

Further, the State lacks a legally recognized interest that will be adversely affected by the July 1992 Decision. There is no evidence that the State has any right, claim, or title to, has any interest in, or uses any land adjacent to the NE corner of sec. 7 or to any other corner reestablished by BLM during the resurvey (using the NE corner as a control point) or elsewhere that will be affected by the Acting State Director's dismissal of the State's protest and his affirmation of BLM's location of the corner. See State of Nevada v. Burford, supra, at 857; Phelps Dodge Corp., 72 IBLA 226, 228 (1983).

The State asserts that BLM's location of the corner will "cause[] considerable discord in the ownership of private lands in th[e] area." (SOR at 1.) Assuming this were the case, there is no evidence that the State is acting on behalf of any of those private landowners. Even if it were, the State does not have standing to appeal where it acts in the role of parens patriae. See State of Nevada v. Burford, supra, at 858; Blaine County Board of Commissioners, 93 IBLA 155, 157-58 (1986). We therefore conclude the State will not be adversely affected by the Acting State Director's July 1992 Decision and lacks standing to appeal. This appeal must therefore be dismissed. See Wilogene Simpson, supra, at 275-76; Alice L. Alleson, 77 IBLA 106, 108 (1983).

Even had we been able to reach the merits of this appeal, moreover, we are not persuaded that BLM failed to properly resurvey the NE corner of sec. 7.

The original monument marking the NE corner of sec. 7 no longer exists. The State has presented no evidence to the contrary. Admittedly, no monument was discovered by Wilkinson in the course of his traverse of the area in running the section lines up to the township boundary in 1906. Nor was it subsequently found by BLM surveyor Herbst, BLM examiner Ravnikar, or State surveyor Brown; neither is there any report it was discovered by any other surveyor. The wood post set by Barton in 1821 is no longer to be found. The BLM surveyor's conclusion that the stone found

by him is a perpetuation of the original wood post set by Barton is supported by the evidence. It was his expert opinion that the stone had been deliberately set. This was also Ravnika's opinion. The fact that the State offers a contrary expert opinion does not establish error. See Robert J. Wickenden, 73 IBLA 394, 397 (1983).

Historical evidence that a stone had at some time been placed at the position of the original wood post would have been critical to a proper determination that the stone is a perpetuation of Barton's post in the absence of other supporting evidence. See Boise Cascade Corp., 115 IBLA 327, 331-32 (1990). In this case, however, it is understandable why such historical evidence is missing, since old county records from which it would have been obtained were destroyed. In such a case, BLM's finding of a perpetuation of the corner may be supported by other evidence, which is found in the record. See United States v. Citko, 517 F. Supp. 233, 239-40, 242 (E.D. Wis. 1981) (corner perpetuated by rock pile of unknown origin); Mr. and Mrs. John Koopmans, 70 IBLA 75, 83-84, 87-88 (1983) (corner perpetuated by axle of unknown origin). Here, BLM has evidence that corners in the area of the resurvey were perpetuated with stones. Moreover, BLM found the remains of what it believes were the original bearing trees. The State and Forest Service confirmed the existence of these remains. See memorandum to the State land surveyor from State Surveyor Brown, dated May 11, 1992, at 2; letter to State land surveyor from Forest Service Surveyors West and Young, dated April 10, 1992. We are not persuaded to ignore this evidence by the fact that the bearings and distances to these trees do not exactly match the record, since such errors were not uncommon in the early surveys. See BLM, Manual of Instructions for the Survey of the Public Lands of the United States, 1973 (Survey Manual), § 5-16, at 132 and § 5-23, at 133; Alfred Steinhauer, 1 IBLA 167, 172-73 (1970).

The deviation in distances is on the order of less than 1 foot and 2.3 feet; in bearings, it is between 0 and 6 degrees. The BLM regards these discrepancies in bearings and distances as ordinary, see Survey Manual, § 5-7, at 130, and we are not persuaded to regard them otherwise. See Stoddard Jacobsen v. BLM (On Reconsideration), 103 IBLA 83, 87 (1988), aff'd, Downer v. Hodel, No. 88-513-HDM (D. Nev. Oct. 12, 1989); Stoddard Jacobsen v. BLM, 97 IBLA 182, 213-14 (1987), rev'd in part, Stoddard Jacobsen v. BLM (On Reconsideration), supra. Nor is the fact that the species of the southwest bearing tree does not match the record conclusive, especially when there is evidence that Barton erred in this regard on other occasions. See Stoddard Jacobsen v. BLM (On Reconsideration), supra, at 87 and Stoddard Jacobsen v. BLM, supra, at 204, 204-05 n.24 (discrepancy as to kind of stone); Elmer A. Swan, 77 IBLA 99, 101 (1983) (discrepancy as to tree diameter).

In addition, BLM's placement of the NE corner of sec. 7 is supported, within an acceptable margin of error, by the calls to the quarter corner to the north, to the NE corners of secs. 18 and 19 to the south, and to the NE corner of sec. 8 to the east, as well as the topographic calls to the north

and west. See Survey Manual, § 5-7, at 130 and § 5-16, at 131-32; Stoddard Jacobsen v. BLM (On Reconsideration), supra, at 87. It is also supported by evidence of a line tree, even though none were called for in Barton's field notes. See Survey Manual, § 5-18, at 132; Stoddard Jacobsen v. BLM, supra, at 194. Again, the State's contrary opinion that this was not a line tree does not establish error.

The BLM's placement of the NE corner of sec. 7 is not overcome by the work of the private and county surveyors. In 1906, Wilkinson set a post at what he believed was the NE corner of sec. 7, but he did not report finding any evidence of the original 1821 survey. He may, therefore, have erroneously monumented the corner. In any case, no evidence regarding Wilkinson's survey of the corner remains on the ground so that it could be traced. There is also no evidence that Yancey, who monumented the quarter and east sixteenth corners on the north line of sec. 7, set those corners at their original surveyed positions. In any case, he did not tie them into the NE corner of that section. We simply do not know how far he was from that corner when he monumented the quarter and east sixteenth corners. We cannot assume that the east sixteenth corner is equidistant from the section corner and the quarter corner. Consequently, Barfield's restoration of Yancey's work cannot be used to establish the location of the NE corner of sec. 7.

Nor is BLM's placement of the NE corner of sec. 7 rebutted by the fact that the land has actually been occupied, as marked by fence lines, in a fashion that runs counter to BLM's location of the section corner. Such occupation may be the perpetuation of an erroneous private or county survey. There is no evidence that it was intended to mark the location of the original survey lines. See James O. Steambarge, 116 IBLA 185, 192-93 (1990). It is clear, moreover, that BLM took such occupation into account; this was proper. See United States v. Doyle, 468 F.2d 633, 637 (10th Cir. 1972); Robert N. Caldwell, 79 IBLA 141, 144 (1984).

The BLM must look at all available evidence to determine whether an original corner has been perpetuated. See Stoddard Jacobsen v. BLM, supra, at 186. As the court observed in United States v. Doyle, supra, at 637, "[b]efore courses and distances can determine the boundary [as the State would do here], all means for ascertaining the location of the lost monument[] must first be exhausted." See also Survey Manual, § 5-21, at 133; (BLM did so here). The record on appeal provides substantial evidence supporting BLM's placement of the NE corner of sec. 7. See James O. Steambarge, supra, at 191; Stoddard Jacobsen v. BLM (On Reconsideration), supra, at 85-86, 87. The State has failed to overcome BLM's conclusion by a preponderance of the evidence, as it was required to do. See Stoddard Jacobsen, 85 IBLA 335, 342 (1985). By virtue of BLM's dependent resurvey, the NE corner of sec. 7 has been reestablished in its true original position. See Survey Manual, § 6-4, at 145. That position is presumed to mark what has always been the boundary between what is now public and private lands. See Survey Manual, § 6-4, at 145; Mrs. J. W. Moore, 8 IBLA 261, 263 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the State's appeal from the Acting State Director's July 1992 Decision is dismissed.

Franklin D. Amess
Administrative Judge

We concur.

Bruce R. Harris
Deputy Chief Administrative Judge

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

David L. Hughes
Administrative Judge

John H. Kelly
Administrative Judge

T. Britt Price
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The majority dismisses the State of Missouri's appeal, citing State of Nevada v. Burford, 918 F.2d 854 (9th Cir. 1990), once again invoking precedents applicable to standing in Article III courts. (Even so, it proceeds to discuss the merits of the appeal.) I believe this is both unnecessary and inappropriate. As I wrote in Colorado Open Space Council, 109 IBLA 274, 316 (1989):

I agree with Judge Bazelon: "[A]bsent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law of judicial standing into the administrative process." 25/ It is enough to answer the question whether someone is adversely affected by a decision of the Department based either on the "functional analysis" suggested by Judge Bazelon in Koniag, supra, or by looking to the "scheme intended and devised by the Congress and the Secretary," as the majority did in that case.

25/ Koniag, Inc., [Village of Uyak v. Andrus], 580 F.2d 601 (D.C. Cir. 1978)] at 614.

I dissent.

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

According to the lead opinion, a state's legislatively and contractually imposed responsibility for proper maintenance and preservation of the land survey monuments, section corners, and quarter section corners established by the United States public land survey within the state is insufficient to afford standing to appeal a Bureau of Land Management (BLM or Bureau) decision to remonument a previously surveyed corner in a manner the State Surveyor deemed to be improper and incorrect. Judge Amess finds that the State of Missouri "lacks a legally recognized interest" that will be affected by the Decision on appeal because it does not have any "right, claim, or title to, has any interest in, or uses any land adjacent to the NE corner of sec. 7 * * *." 142 IBLA 201, 207 (1998). We cannot agree.

The State of Missouri, Department of Natural Resources (DNR), appealed the dismissal of its protest of the acceptance of the final resurvey plat and field notes for dependent survey, Group 28, Missouri. The State contends that when this dependent survey was made, the monument for the corner common to secs. 5, 6, 7, and 8, T. 28 N., R. 6 E., Fifth Principal Meridian, Wayne County, Missouri, (NE corner of sec. 7) was not placed at the location of the corner established in the original survey, as is required when conducting a dependent survey.

The U.S. Army Corps of Engineers asked BLM to conduct a dependent resurvey of the "Wappapello Lake Boundary" in secs. 7 and 18, T. 28 N., R. 6 E., Fifth Principal Meridian, Wayne County, Missouri. When the dependent survey instructions were issued, this survey was extended to the NE corner of sec. 7, to provide a control point for surveying the Wappapello Lake boundaries. The Special Instructions for Group No. 28, Missouri, specifically state that the "surveyor will be guided by the provisions of these instructions, the Manual of Surveying Instructions, 1973, pertinent laws of the State of Missouri, and any supplemental instructions which may be issued during the course of this assignment." (Special Instructions at 1.)

The Manual for the Surveys of the Public Lands of the United States, 1973 (Survey Manual) has special status in cadastral survey cases. "The courts have recognized the [M]anual as a proper statement of survey principles." United States v. Doyle, 468 F.2d 633, 637 (10th Cir. 1972). The Survey Manual defines a dependent resurvey as

a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. The section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the plat of the original survey. In legal contemplation and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical.

(Survey Manual 6-4, page 145.) See also Crow Indian Agency, 78 IBLA 7, 10 (1983); Mr. and Mrs. John Koopmans, 70 IBLA 75, 76-77 (1983). The proper execution of the dependent resurvey serves to protect the bona fide rights of the land owners, because a properly executed dependent resurvey traces the lines of the original survey. John W. Yeargan, 126 IBLA 361 (1993).

Missouri Statute § 60.510(1) (RSMo 1994) directs DNR "[t]o restore, maintain, and preserve the land survey monuments, section corners, and quarter section corners established by the United States public land survey within Missouri, together with all pertinent field notes, plats and documents." Recognizing this responsibility, BLM and the State entered into a Memorandum of Understanding (MOU) in May 1983. This MOU remained in effect during the course of the survey, at the time of the protest, and, as far as is known, is in effect at this time. This MOU memorialized the agreement that BLM and the State would "protect the bonafide rights of the owners of land affected by federal surveys, resurveys or retracements by complying with state statutes and regulations when such surveys affect private ownership or is [sic] adjacent to private lands," (emphasis added).

Standing to appeal a decision of BLM to the Interior Board of Land Appeals is governed by 43 C.F.R. § 4.410(a), which provides in relevant part that "[a]ny party to a case who is adversely affected by a decision of the Bureau of Land Management * * * shall have a right of appeal to the Board." In Oregon Natural Resources Council, 78 IBLA 124, 125 (1984), the Board analyzed the regulation in this way:

There are two separate and discrete prerequisites to prosecution of an appeal before this Board: (1) that the appellant be a "party to the case," and (2) that the appellant be "adversely affected" by the decision appealed from. See 43 CFR 4.410. Denial of a protest makes an individual a party to a case. Such a denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally recognizable "interest" has been adversely affected by denial of the protest. In Re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982).

There is no argument that the State is a party to the case. See In Re Pacific Coast Molybdenum Co., *supra*, at 331.

The legally recognizable interest can be an economic interest. Allen D. Miller, 125 IBLA 139 (1993); John D. Archer, 120 IBLA 290 (1991). As the basis for finding that the State has no legally recognizable interest that has been adversely affected by denial of the protest, Judge Amess finds that there is no evidence of "any right, claim, or title to, has any interest in, or uses any land adjacent to the NE corner of sec. 7 * * *." 142 IBLA at 207. Judge Amess' finding that the State held no direct interest in the adjacent property is correct. However, this Board rejected this narrow "no direct interest" interpretation of a legally recognizable interest many years ago. When addressing Pacific Coast Molybdenum Company's argument for a motion to dismiss, Judge Burski noted: "As we read

[Pacific Coast Molybdenum Company's] arguments, the basic thrust of the motion to dismiss is that only someone who claims a legal interest in the specific land involved has standing to appeal from denial of a protest. So restrictive an interpretation is impossible to sustain." In Re Pacific Coast Molybdenum Co., supra.

The State has a legally cognizable interest adversely affected by BLM's survey. If BLM's dependent resurvey is incorrect, as the State alleges, the survey impairs the State's ability to restore, maintain, and preserve the monuments for the corner common to secs. 5, 6, 7, and 8 as originally surveyed and subordinate corners in the vicinity of that corner. When, as here, a dependent resurvey is involved, the State's duty to restore, maintain, and preserve original corners is not simply a ministerial act requiring the State's acceptance of whatever data BLM should file. If incorrect, BLM's survey creates confusion as to the location of the original common corner and frustrates the State's efforts to preserve the true corner common to secs. 5, 6, 7, and 8 as originally surveyed, as mandated by its statutes and by its MOU with BLM, as well as other corners in the general vicinity of that corner. The State's duty to maintain pertinent field notes, plats, and documents under § 60.510 (RSMo 1994) would be similarly impaired by an incorrect survey. The State will be called upon to expend time and resources it would not spend if the corner had been properly placed, including the time and resources necessary to remonument subordinate corners previously established pursuant to State statutes and the MOU. This is a legally recognizable interest which has been adversely affected by denial of the protest. ^{1/}

An independent basis for standing also rests on the May 1983 MOU signed by BLM and the State. The MOU makes plain that BLM and the State both agreed to protect the bonafide rights of owners of land affected by Federal resurveys by complying with state statutes and regulations when such surveys affect private ownership or are adjacent to private lands. The record is plain that private lands in secs. 5, 7, and 8 each share a common corner at the point in dispute. The State Attorney General's office contends that BLM's survey was not performed in accordance with State standards having the force and effect of law. In effect, the State is arguing that BLM breached the MOU that it had entered with the State. Whether true

^{1/} As a basis for rejecting the argument that the State will incur actual and real damages if the corner is improperly monumented, the lead opinion contains a detailed discussion of the reasons for rejecting the doctrine of parens patriae. While interesting, this discussion is not material. The State has not raised the doctrine of parens patriae, and no mention of that doctrine can be found anywhere in the State's pleadings, including the State's brief in support of standing, which was filed at the direction of this Board. The State did present evidence and valid arguments that its interest will be adversely affected. None of these arguments was addressed in the lead opinion. The State's legally recognizable interest has been adversely affected, and there is a valid question regarding BLM's compliance with the MOU.

or not, this is a sufficient allegation of injury to satisfy the requirements of 43 C.F.R. § 4.410. The MOU reflects a willingness by BLM to comply with State standards in cases such as this one. To construe 43 C.F.R. § 4.410 to deny standing to the State is to frustrate the State's attempt to enforce an agreement that BLM and the State freely entered. Compare BLM's acknowledgment of an MOU requiring compliance with state laws and regulations, discussed in Department of the Navy, 108 IBLA 334 (1989).

A further basis for standing can be found in Board cases finding that standing also rests in part on whether allowing the appeal will assist the agency in fulfillment of its functions. High Desert Multiple-Use Coalition, Inc., 116 IBLA 47, 48-49 n.1 (1990). The State possessed sufficient expertise in surveying to enter into an MOU with BLM regarding the maintenance and preservation of corner monuments within its jurisdictional boundaries. The State of Missouri stands in the usually compelling position of being able to afford constructive expertise to assist BLM in the proper remonumenting of corners in the State of Missouri.

Other Board cases further illustrate why a restrictive interpretation of the State's legally cognizable interest cannot be sustained. In Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), the State of Alaska was held to have standing to appeal a decision of the Bureau of Indian Affairs (BIA) finding certain Native villages eligible to make land selections under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1994). "Any party aggrieved" by BIA's decision could appeal to the Alaska Native Claims Appeal Board. The State's interest, however speculative, that "at some later time for some undisclosed reason it might, under the Alaska Statehood Act, seek to have land patented to it that would be claimed by these villages" was enough to confer standing upon the State. 580 F.2d at 607. Koniag is instructive because standing was premised upon the possible adverse effect of Departmental action in impairing a State's ability to carry out the terms of a statute.

In State of Alaska v. Sarakovikoff, 50 IBLA 284 (1980), the Board found that the State of Alaska had standing to appeal a BLM decision to grant a Native allotment, even though the State could not obtain the land embraced in the allotment. If the State could defeat the Native allotment, a village corporation would be required to select the allotment lands, thereby diminishing the village's ability to select lands suitable for State selection under the Alaska Statehood Act. Alaska's interest, however attenuated, was sufficient to confer standing on the State. The existence of standing cannot be made dependent upon the ultimate substantive success on appeal. State of Alaska (Harvey Pootoogooluk), 121 IBLA 363, 366 (1991); California State Lands Commission, 58 IBLA 213, 217 (1981).

The State of Missouri was expressly found to have standing to appeal BLM's approval of a mineral exploration plan in Missouri Coalition for the Environment, 124 IBLA 211, 217 (1992). There the Board found that

the interest of Missouri might be adversely affected by mine-related water degradation because the State might be called upon to clean up the problem. This decision does not comport with Judge Amess' insistence that the State has standing only when it shows direct injury to its right, claim, or title to, or interest in, or uses of adjacent land.

Finding standing, we also disagree with Judge Amess' holdings on the substantive issues in this case.

Chapters V and VI of the Survey Manual are relevant to this case because they contain the standards to be followed when performing a dependent resurvey. When doing the initial public land survey, a BLM cadastral surveyor will conduct the survey to establish the exact location of the corners and then erect a marker or "monument" at each corner to identify and perpetuate the location of the corner. After a period of time, these monuments may be lost, destroyed, or moved. When it becomes necessary to reestablish the location of the corners, as originally established, a dependent survey is called for.

When undertaking a dependent resurvey, the surveyor must attempt to reconstruct the original survey, and relocate and remonument corners, with titles, areas, and descriptions unchanged. ^{2/} Jean Eli, 78 IBLA 374, 376 (1984). This reconstruction is to be undertaken in conformance with the instructions set out in the Survey Manual. When the Survey Manual was written, the authors carefully selected the terms used in the Survey Manual instructions. For example, when the term "corner" is used in the Survey Manual, the reference is not to a cap, a post, a pile of stones or some other physical monument. A corner is a point on the earth's surface which has been identified by its relationship to other points on the earth's surface and described by giving distances and bearings from the other points. A "monument" is the object or physical structure which marks the corner point. (Survey Manual 5-4, at 129.) The terms "corner" and "monument" are not interchangeable.

When the surveyor sets out to restore what purports to be the original conditions of the official survey from the record and physical evidence in the field, the first step is to find the identifiable corners of the original survey. After this has been accomplished, the surveyor will restore lost corners by proportionate measurement in harmony with the record of the original survey. (Survey Manual 6-25, at 149.)

^{2/} The primary intent is to remonument the location of the corners established during the course of the original survey. If the surveyor who did the original survey erred in some manner when setting the original corners, the dependent survey should remonument the corners where the original survey placed them, rather than where they should be. In many areas of this country, the section lines are far from north-south or east-west, and the shapes of the subdivisions are far from regular and square. See, e.g., T. 33 N., R. 11 W., Mount Diablo Meridian, California.

In a dependent resurvey, a corner is categorized in one of three ways. The Survey Manual describes an existent corner as a corner "whose position can be identified by verifying the evidence of the monument or accessories [placed by the original surveyor,] by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or testimony." (Survey Manual 5-5, at 130.) An obliterated corner is described in the Survey Manual as a corner at whose point "there are no remaining traces of the monument or its accessories, but whose location has been perpetuated or may be recovered beyond reasonable doubt by relying on the acts or testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence." (Survey Manual 5-9, at 130.) A lost corner is described as "a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony which bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners." (Survey Manual 5-20, at 133.) See also Longview Fibre Co., 135 IBLA 170 (1996).

The basic issue in this case is how the NE corner of sec. 7 should be categorized. ^{3/} Therefore, a restatement of pertinent facts is warranted. J.W. Barton, a surveyor with the General Land Office (GLO), surveyed the NE corner of sec. 7 in 1821. The field notes from his 1821 survey state that a wood post was set in the ground at the NE corner of sec. 7, which was 27 links S. 28° W. of a 20-inch diameter black oak and 50 links N. 30° E. of an 18-inch diameter white oak.

The dependent survey field work was performed by William H. Herbst, a BLM cadastral surveyor, between November 1989 and March 1990. In his reconnaissance preliminary to remonumenting the NE corner of sec. 7, Herbst went to where he believed the corner monument should be. He found no evidence of a wood post but did find a 13-inch by 12-inch by 11-inch (almost round) flint stone two-thirds buried in the ground. He took this stone to be a perpetuation of the corner. No bearing trees were found, but Herbst identified a depression in the ground he believed to be the site of the black oak. This depression was 23.5 links N. 22° E. (rather than 27 links on a bearing of N. 28° E.) of the stone. He also found what he believed to be a stump hole filled with rotted wood which he accepted as the remains of the white oak. This hole was 48.5 links S. 30° W. (rather than 50 links S. 30° W.) of the stone. Herbst remonumented the NE corner of sec. 7 at the location of the 13-inch by 12-inch by 11-inch flint stone.

At the conclusion of Herbst's field work, the Forest Service, U.S. Department of Agriculture (Forest Service), objected to BLM's placement of the NE corner of sec. 7. It noted that Herbst's placement of the

^{3/} The burden of proof in a survey case is a preponderance of the evidence, and the Survey Manual defines what must be proved by a preponderance of the evidence.

corner "significantly relocates all of the historic property lines in the area and affects the * * * [b]oundary [of the Mark Twain National Forest.]" (Letter to Congressman Emerson from Forest Supervisor, Mark Twain National Forest, Forest Service, dated Mar. 28, 1990.) The Forest Service stated that it believed the corner to be "lost." Id.

After receiving the Forest Service objection, BLM field examiner Kenny D. Ravnikar examined the work performed by Herbst. Ravnikar concluded that the "set of flintstone recovered by Herbst is a perpetuation of the original corner of section 5, 6, 7, and 8 * * *." (Report at 4.) He then stated: "Although there is no available record of the individual(s) responsible for this perpetuation, the use of set stones or pine knots to perpetuate identified original corner positions was a common practice of the local surveyors in this area." (Memorandum to the Deputy State Director for Cadastral Survey, dated June 18, 1990, at 5 (emphasis added).)

A copy of Ravnikar's report was sent to the Forest Service and the State Land Surveyor. On August 7, 1990, Robert E. Myers, the State Land Surveyor responded, noting his discussions with concerned landowners and stated that he would review the Ravnikar report and advise BLM of his findings. On January 22, 1991, Myers notified the Forest Service and BLM that it was his conclusion that the stone Herbst identified as being at the NE corner of sec. 7 was not at the location of the original corner.

Myers based this conclusion on several factors. Barton had not set a stone at the corner, and there was no corroborating evidence that a stone had been set at the location of the original wood post at any time following the original survey. The corner had been surveyed by county surveyor H.C. Wilkinson in July 1906, who found no monument at that location. Myers had examined the site and found 26 stones similar to the stone recovered by Herbst within an 80-foot radius of what Herbst identified as the stone representing the NE corner of sec. 7. The bearings and distances to the depressions taken as evidence of bearing trees did not match the original record, and there was no evidence of a bearing tree other than a hole in the ground.

Finally, Myers stated that Herbst's placement of the corner "does not coincide with current occupation in sec[s.] 6 [and] 7 which can be shown to have existed prior to 1912." (Jan. 22, 1991, letter at 5.) Myers' opinion was that the NE corner of sec. 7 was not properly located. He relied on collateral evidence, noting that no work of county and private surveyors in the area since 1892 supported the location of the corner as shown in the dependent resurvey, and the NE corner of sec. 7 should therefore be considered to be "obliterated." Id. at 6. The Forest Service agreed with the Myers conclusion. See letter to Army, dated Mar. 6, 1991, at 1.

The Bureau responded to Myers in a June 24, 1991, letter rejecting Myers' analysis of Herbst's survey. The Bureau admitted there was no evidence of a stone having been placed to perpetuate Barton's monument at the NE corner of sec. 7. The Bureau advised Myers that it was accepting the stone as a monument of the corner without any testimony of witnesses or

any acceptable record that could be used to identify the stone as a perpetuation of the original monument, and postulated that, because the county's records had been destroyed by fires in 1854 and 1892, any record of a county surveyor setting a stone might have been lost at that time.

The Bureau noted that there were numerous surviving reports of instances where county surveyors (including Wilkinson) used stones to perpetuate original GLO corners. The Bureau also stated that it had searched the area surrounding the NE corner of sec. 7 during the course of the survey field work and the April 1990 field examination and that, while numerous stones were to be found, "none displayed the characteristics generally associated with stones physically set to monument corner positions." (Letter to State Land Surveyor, dated June 24, 1991, at 2-3.) The Bureau noted its reliance on Herbst's conclusion that the stone he deemed to be a perpetuation of the monument "was not naturally occurring, but had been deliberately set." Id. at 3.

The Bureau also accepted Herbst's conclusion regarding evidence of two bearing trees, acknowledging the discrepancy in bearings and distances between what was reported by him and what Barton had recorded, attributing the difference to Barton's use of a magnetic compass and chain. The Bureau dismissed the evidence of longstanding occupation, stating that there was nothing to show that the boundaries accepted by the land owners represented the lines of the original survey. The Bureau stated that substantial evidence supported the conclusion that the stone recovered by Herbst was a perpetuation of the original monument set by Barton.

The Bureau stated that it had considered the work of Wilkinson and county surveyor J. Yancey but could not rely on it. The Bureau discounted Yancey's placement of the quarter corner because it was situated 3.5 chains west of a brook, rather than 2.5 chains east of it, and was never tied to the NE corner of sec. 7. The Bureau stated that the sixteenth corner set by Yancey was also rejected because it had merely been set a record distance from the quarter corner and the section corner. The Bureau concluded that these monuments could not serve as evidence of the location of the NE corner of sec. 7 because they had never been tied to that corner.

In January 1992, Deputy State Surveyor Norman L. Brown remonumented the NE corner of sec. 7 in a position he deemed to be correct. As the basis for the location of this corner, he used monuments of the east sixteenth and quarter corners between secs. 6 and 7, set by county surveyor Yancey in August 1892, and recovered by Wilkinson in June 1912. Brown noted that, adhering to Wilkinson's survey, private surveyor, D.R. Barfield, remonumented these corners in April 1986 and then continued west on the line between secs. 6 and 7 to the range line, remonumenting Yancey's location of the west sixteenth corner. Brown located the NE corner of sec. 7 by running a line east from the east sixteenth corner on the section line between secs. 6 and 7 for the same distance as that between the east sixteenth corner and the quarter corner. Certification of Brown's restoration of the NE corner of sec. 7 was signed by him on February 25, 1992, and filed for record with the State on July 15, 1992.

The Bureau's final resurvey plat and field notes were accepted by the Chief Cadastral Surveyor, Eastern States, on February 3, 1992, and notice of acceptance was published in the Federal Register. See 57 Fed. Reg. 5167 (Feb. 12, 1992). On March 24, 1992, the State filed its formal protest of the acceptance of the plat and field notes, contending again that the NE corner of sec. 7 had not been remonumented by BLM where the original corner was established by Barton in 1821.

In its protest, the State contended that there was no evidence that the stone recovered by Herbst had ever been placed at the location of the original corner. The State referred to the discrepancies in bearing and distance between the monument and the northeast bearing tree (6° and 3.5 links) and noted that discrepancies of that size were significant and uncommon in Missouri surveys. The State reported that an analysis of the remains of what BLM had identified as the southwest bearing tree, which Barton had recorded as a white oak, showed that the remains were of a hickory tree. See Memorandum to State Land Surveyor, dated May 11, 1992, at 2. The State also referred to the discrepancies in distances to the run and the brook, north and west of the NE corner of sec. 7, as support for its contention.

In his July 21, 1992, Decision, the Acting State Director relied on the Deputy State Director's June 1991 letter to the State Land Surveyor for his conclusion that BLM had properly deemed the discrepancies in bearings and distances to the bearing trees tied to the NE corner of sec. 7 insufficient to reject reliance on the trees. See Decision at 3. He concluded that, although discrepancies may not have been common in Missouri surveys, they were not uncommon in surveys performed by Barton. By way of "illustration," the Acting State Director referred to an 1855 resurvey of lines originally surveyed by Barton in T. 29 N., R. 4 E., Fifth Principal Meridian, Missouri. Id. The Acting State Director noted that Snider, a GLO surveyor who had resurveyed a portion of Barton's survey in 1855, reported discrepancies in Barton's reported bearings and distances to bearing trees, "ranging from gross variations to those of relatively the same magnitude as reported in the 1989 dependent resurvey." Id. at 3-4. The Acting State Director also noted that the same 1855 resurvey disclosed that Barton had incorrectly described the species of a bearing tree on many occasions. Accordingly, the Acting State Director dismissed the State's protest, concluding that the State had not established by a preponderance of the evidence that BLM's resurvey had incorrectly located the NE corner of sec. 7. The State has appealed from the Acting State Director's July 21, 1992, Decision.

The only evidence of what Herbst deemed to be the bearing trees was depressions in the ground. There is no evidence that one of the depressions contained any tree remains; the second contained wood remains Herbst identified as white oak that were later analyzed by the State and found to be hickory. See Memorandum to State Land Surveyor, dated May 11, 1992, at 2. There was no evidence directly identifying either of these stump holes as bearing trees. In the absence of some evidence corroborating that the trees are the original bearing trees, the pattern of trees

will not alone suffice to identify the location of either of the original corners. Longview Fiber Co., 135 IBLA 170, 179 (1996); see also O.R. Williams, 60 Interior Dec. 301 (1949).

The original monument was a wooden post. No evidence of the original monument was recovered during the course of the dependent resurvey. Two stump holes were found. The bearings and distances from the stone to the two stump holes did not match those found in the field. The Bureau dismissed the State's objection to the use of the stump holes as evidence of bearing trees because it found discrepancies in Barton's reported bearings and distances to bearing trees, ranging from gross variations to those of relatively the same magnitude as reported in the 1989 dependent resurvey. It also dismissed the State's reference to the fact that the species of one of the trees did not match the field notes by stating that Barton had incorrectly described the species of a bearing tree on many occasions.

On one hand, BLM finds two stump holes sufficient evidence of bearing trees. It uses bearings and distances from these trees as proof that a stone had been placed at the corner to be a perpetuation of the monument at the NE corner sec. 7, by an unknown party at an unknown time in the past, even though those bearings and distances did not correspond with those in the field notes. On the other hand, BLM rejects the State's objections because it found numerous discrepancies in Barton's field notes, with variations in Barton's reported bearings and distances to witness monuments ranging from gross to a magnitude similar to that noted by the State. The Bureau also dismisses the State's finding that the tree was not the same as that described in the notes because Barton had incorrectly described the species of a bearing tree on many occasions. If BLM's description of Barton's field notes is true, it appears that BLM is defending its conclusion by saying that Barton's notes are sufficiently accurate to be used, even though they are so inaccurate that they cannot be believed.

The Survey Manual 5-9, at 130, provides that an identification of the location of a corner established in the original survey can be accepted when the location has been perpetuated or the point is "recovered beyond reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, witnesses, or by some acceptable record evidence," or the location of a corner is established by collateral evidence which is supported by comparing the relationship of that corner to known corners.

Herbst deemed a 13-inch by 12-inch by 11-inch flint stone set by some unknown party at some unknown date as evidence of the perpetuation of the monument for the NE corner of sec. 7. The record contains no statements by interested landowners, competent surveyors, witnesses, or any other acceptable record evidence supporting a conclusion that the corner was remonumented with that stone. The only "testimony by an interested landowner" found in the record is the Forest Service objection to the location of the corner because it "significantly relocates all of the historic property lines in the area and affects the * * * [b]oundary [of the Mark Twain National Forest.]" (Mar. 28, 1990 letter, supra.)

In its response to the objections filed on behalf of the State, BLM admitted that there is no evidence supporting its conclusion that the flint stone was used by some unknown surveyor to perpetuate the NE corner of sec. 7 and stated that it relied on the fact that local surveyors had used stones as monuments in the past. The Bureau concluded that none of the 26 similar stones found by Myers within an 80-foot radius of BLM's stone monument displayed the characteristics generally associated with stones physically set to monument corner positions. However, there is no physical evidence that the flint stone deemed a perpetuating monument was marked in any manner that would differentiate it from the other 26 stones, and no differentiating characteristic was described for the record or evident in the photographs found in the record. Without corroborating evidence, two material uncertainties remain. First, was the stone used by some unidentified and unknown surveyor as a monument? Second, if it was intended to be a monument, was it intended to be a monument of the location of the NE corner of sec. 7? There is nothing in the record to answer either of these questions.

The only historic evidence used by BLM to support its finding that the stone represented a remonumenting of the NE corner of sec. 7, was two fires in the courthouse (one in 1854 and the second in 1892). The Bureau uses these incidents as a basis for its conclusion that the lack of evidence of the remonumenting of the corner is a result of these fires. On the other hand, there is strong evidence that BLM's placement of that corner significantly relocates historic property lines in the area, and affects the boundary of the Mark Twain National Forest. These facts alone raise a significant question about whether the section lines and lines of legal subdivision established by the dependent resurvey represent the best possible identification of the true legal boundaries on the basis of the plat of the original survey. If the stone was a remonumentation of the corner, it would follow that those using the land would use the stone to locate their property lines. The evidence was that they did not.

Judge Amess recognizes the lack of corroborative evidence but concludes that the stone itself is evidence. In doing so, he has accepted the stone as evidence of a remonumented corner without supporting acts or testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence. This additional corroborating evidence is specifically called for in the Survey Manual, and dependent resurveys must be conducted in accordance with that manual. Without corroborating evidence, an equally valid conclusion could be drawn that the rock was the monument used to identify the southwest corner of farmer Jones' pig lot.

The lead opinion accepts the location of the stone as the NE corner of sec. 7 because the linear deviation was in the order of less than 1 foot and less than 2.3 feet in bearing, which was within the acceptable degree of error. In survey terms, the inaccuracy of the survey is not a result of error—it is the result of a mistake. Surveying error results from the

imperfections of equipment or techniques surrounding conditions, or human limitations. (U.S. Department of the Interior Glossary of Surveying and Mapping Terms, Second Edition, 1980, at 78.) Surveying error is expected, and methods have been developed for making compensating adjustments to correct surveying error. Error is not to be confused with a blunder or mistake. Id. On the other hand, surveying mistakes are caused by a misunderstanding of the problem, by carelessness, or by poor judgment. Mistakes are not acceptable and must be eliminated by redoing part or all of the job. (Russell C. Brinker, Elementary Surveying, 5th edition (1969).) There is no compensating for or defending a mistake, and if a mistake is found, the survey is redone. The State alleges that BLM failed to adhere to the requirements set out in the Survey Manual when it called the stone a remonumented corner. This was a mistake, not an error. Any argument that the mistake should be accepted because the survey could be deemed to be within the acceptable tolerance of error, mistakenly confuses these terms and is not acceptable. This argument has been tried before and rejected. See First American Title Insurance Co. v. BLM, 9 OHA 17 (1991), appeal filed sub nom. Fort Mojave Indian Tribe v. Lujan, Civ. No. 90-0280-PCT-EHC (D. Ariz. Feb. 20, 1990). If the acceptance of the monument was not in accordance with the Survey Manual, that failure is a mistake, and a decision to accept a survey based on that acceptance must be overturned, regardless of any argument regarding the accuracy or acceptability of the result.

The survey should be set aside, and BLM should be directed to resurvey the NE corner of sec. 7 in a manner that complies with the Instructions, the Survey Manual, and the MOU with the State of Missouri.

R.W. Mullen
Administrative Judge

I concur:

James L. Bymes
Chief Administrative Judge

